IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1655

PARKER SWEEPER COMPANY,

Petitioner,

v.

THE E. T. RUGG COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF

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Petitioner, PARKER SWEEPER COMPANY, is filing this Reply Brief in accordance with Rule 24(4) of the Supreme Court Rules; it is addressed solely to an argument raised for the first time in "Respondent's Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit". Respondent's argument is that Petitioner did not apply for its Writ of Certiorari within the time limits prescribed by 28 U.S.C. 2101(c).

ARGUMENT

In its said Brief, Respondent argues that certiorari should be denied because: "I. Petitioner Did Not Timely Apply for the Writ in Accordance with Statutory Time Limits". It is respectfully submitted that this is a purely specious argument.

The judgment of the Court of Appeals for the Sixth Circuit was entered on February 27, 1973; Petitioner's timely filed Petition for Rehearing by that Court was filed on March 13, 1973; the said Petition was denied on April 16, 1973. Ninety days (Supreme Court Rules 10, 11, 13 and 22) from April 16, 1973 is July 15, 1973; the Petition for a Writ of Certiorari was docketed June 9, 1973, clearly well within the allotted time.

Respondent's only basis for arguing that the Petition for Writ of Certiorari was filed late is that the Petition for Rehearing must be ignored and the time counted from the original entry of judgment, not from the date of the denial of the Petition for Rehearing. Respondent cites no authority for this proposition. Such proposition is patently untenable.

In Volume 7 of *West's Federal Practice Manual*, Second Edition (Volz, 1970), Section 8844, pp. 314, 315, Certiorari—Time for Applying, it is stated:

> "In all other cases the statutes prescribe that the petition for certiorari must be filed within 90 days following the entry of the judgment and that this period of time may be extended for an additional 60 days."
>
> "The finality of a judgment is suspended if a timely petition for rehearing or reconsideration is filed, and the time is computed from the date in which the lower court acts on the petition."

This has long been the law. United States Statute 28 U.S.C. 2101(c), reproduced at page 2 of Respondent's appendix, is the successor to section 350 of Title 28 U.S.C., 1940 ed., substituting "ninety days" for "three months", see "Historical and Revision Notes" 28 U.S.C. 2101, p. 86. Under the older statute the Supreme Court held:

> "In so holding that court recognized the general rule that where a petition for rehearing, a motion for a new trial, or a motion to vacate, amend or modify a judgment is seasonably made and entertained, the time for appeal does not begin to run until the disposition of the motion." *Leishman* v. *Associated Wholesale Elec. Co.*, 318 U.S. 203 at 205 (1943).

In a still earlier case, the Supreme Court, also with respect to the effect of a still earlier statute using the "three months" language (Act of September 6, 1916, c. 448, 39 Stat. 726, 727, 728), held as follows:

> "Where a petition for rehearing is entertained the judgment does not become final for purposes of our review until such petition has been denied or otherwise disposed of and the three months' limitation begins to run from date of such denial or other disposition." *Citizens Bank of Michigan City, Indiana*, v. *Opperman*, 249 U.S. 448 at 450 (1919).

Furthermore, the Rules of Appellate Procedure also make it abundantly clear that Petitioner's Writ was indeed timely filed. Rule 40 sets forth the 14 day time period for filing the Petition for Rehearing; Petitioner complied with this rule. Rule 41(a) specifies that the timely filing of such a Petition will stay the mandate until disposition of the Petition, and Rule 41(b) provides for continuing the stay until final disposition by the Supreme Court; all of these Rules were properly complied with by Petitioner. Clearly the filing of a Petition for Rehearing is not a meaningless act. Not until there is a final disposition of such a Petition for Rehearing is there a final entry of the judgment appealed from.

CONCLUSION

For all of the foregoing reasons, therefore, it is respectfully submitted that Petitioner has timely filed its Petition for a Writ of Certiorari; such petition should not be denied on the basis that it was not timely filed.

Respectfully submitted,

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